STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2003
v	No. 241310 Macomb Circuit Court
ODELL TAMAR TAYLOR, Defendant-Appellant.	LC No. 01-002055-FC

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). He was sentenced as a fourth habitual offender, MCL 769.12, to 320 to 480 months' imprisonment. He appeals by right. We affirm.

The complainant testified that she was working alone at a Seven-Eleven store on the night of the incident. At about 3:00 a.m., defendant, whom she had never seen before, entered the store; nobody else was in the store at that time. According to the complainant, defendant grabbed her by the neck and took her into a store room in the back. She testified that in the store room defendant told her that he had a gun and that if she did not do what he told her, he would kill her. She said that he told her to take her jeans off, that she begged him not to do this to her, but that eventually she complied. Defendant then raped her. Defendant then had her accompany him back to the front part of the store where he had her open the cash register. She gave him the money and defendant himself grabbed the coins. She said that defendant then took her to the back room again and again raped her.

The complainant testified that she was not an habitual Valium user, that the incident was not "a drug for sex exchange" between her and defendant, and that she did not consent to the sexual intercourse. Notably, the complainant said that after the incident her boss, Darlene (Barrow), asked her if she wanted Valium to calm her down and that she took the one Valium pill that Barrow gave her.

In contrast, defendant testified that he met the complainant over a month before the charged incident when he went to the store. He said that he asked her for her phone number and that she wrote down the telephone number for the Seven-Eleven store and gave it to him. Defendant claimed that he spoke to the complainant on the telephone at least twice and that she

eventually asked him if he knew where she could get some Valium. He said that after he told her he could get some Valium, she asked for about $50 worth. Defendant testified that the complainant indicated that she would be working on the night of the incident and that she would give him $50 from the cash register and pretend like she was robbed. Defendant said he gave her the pills, and she gave him $50 from the cash register. Defendant testified that the complainant then led him to an area of the store where they had consensual sex. She also told him to take some cigarettes from a stack, so he took two cartons.

I

Defendant first argues that testimony of Margaret Lane, a registered nurse, who stated that the complainant's bruises were consistent with a sexual assault, was improperly admitted. Because defendant did not object to this testimony below, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant is not entitled to relief under this standard.

Nurse Lane testified that she was specially trained as a sexual assault nurse examiner and that she had examined "a hundred" women who had claimed to have been sexually assaulted. She testified in substantial detail about finding bruises on the complainant's left arm, neck, back, and genital area during her examination on the day of the alleged incident. In particular, Nurse Lane described bruising at three different locations around the complainant's urethra and a half-centimeter tear or laceration at the bottom of her vagina. Nurse Lane indicated that from her experience, the bruising found in the complainant's genital area was consistent with a sexual assault.

Defendant asserts that Nurse Lane's testimony was irrelevant because she lacked experience in examining patients after having had consensual sex. We disagree. Nurse Lane's testimony that the bruises to the complainant's genital area were consistent with her examinations of alleged victims of sexual assault was relevant to corroborate the complainant's allegation. In order for it to be plainly irrelevant, as defendant claimed, it would have to be apparent that the bruising could just as likely arise from consensual sexual activity. But, we believe that jurors could reasonably and properly determine on the basis of general knowledge and common life experience that such extensive bruising was unlikely to result from consensual sexual activity. Further, Nurse Lane testified that women do not normally have injury in the genital area. The fact that sex is a normal human activity that does not ordinarily result in injury further supports the relevancy of medical testimony that the bruising to the complainant's genital area was consistent with a sexual assault. See *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776 (it is enough for relevancy if evidence makes a fact "slightly more probable than it would appear without that evidence"). Accordingly, we conclude that it was not plain error to admit Nurse Lane's testimony.

Defendant also asserts that Nurse Lane was not qualified as an expert witness or to give the testimony at issue. But, MRE 701 provides that even a lay witness may testify to opinions that are rationally based on the perception of the witness and helpful to a determination of a fact in issue. Because it is readily apparent that Nurse Lane's testimony was rationally based on her perceptions from examining many victims of sexual assault, there was no plain error in this regard. See *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999)

(lay opinion testimony regarding a person's competence in signing a document was admissible where it was based on the witnesses' perceptions and helpful to a clear understanding of a fact at issue).

II

Defendant next argues that the prosecutor improperly appealed to the sympathy of the jurors during closing argument. Again, because this issue was not preserved with an appropriate objection below, we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764. The prosecutor's remarks regarding what the complainant might have been thinking in connection with the incident were:

> I'm a good person. I don't deserve this. Why is this happening? I'm going to close my eyes and pretend that this isn't happening and then it's going to go away.
>
> That's what it must have been like for her as this is going on. She's never going to forget until the day she dies. She's going to try to be strong and overcome it.
>
> She's tried to talk about it to people, but she's never going to forget it.

This was part of an overall argument in which the prosecutor asserted that the complainant was "not ready to talk about it just yet" in order to explain why she did not immediately tell police officers about the sexual assault when they arrived at the scene.

In the context of the questions to the complainant about when the police first arrived at the scene, she testified that she did not immediately tell the police that she had just been raped. She explained:

> When everybody started coming into the store there was [sic] three or four male police officers. There was a male detective, there was all men except Darlene, my boss. One of the officers actually is my cousin. I was very traumatized. I was in a state of shock. I was embarrassed. I don't even remember talking to half of them, and all I wanted to do was go home.

This testimony provided an appropriate basis for the prosecutor's remarks. They were offered to explain the complainant's failure to immediately tell the police about the sexual assault. The complainant's embarrassment and state of shock reasonably support the prosecutor's argument that the complainant was pretending that the incident did not happen and just wanted it to "go away." Prosecutorial argument regarding this point was appropriate because a prosecutor is permitted to argue from the evidence matters affecting the credibility of a witness. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (a prosecutor may argue from the facts that a witness is credible). Considered in context, the remarks at issue did not constitute an improper appeal for sympathy. *Id.* Plain error has not been shown.

III

Defendant advances several claims of ineffective assistance of counsel. Because defendant did not raise this issue below, our review is limited to the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). In order to establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that this prejudiced the defense to the extent that there is a reasonable probability that the outcome would have been different but for the deficient performance. *Id.* at 140; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that trial counsel was ineffective because he inaccurately stated in closing argument that he had no prior convictions for assaultive crimes "because if there were, you would have heard about it, I'm sure." This statement led the trial court to inform the jury that defendant had convictions in addition to those theft-related convictions disclosed during his testimony. Trial counsel's statement was clearly inaccurate because the presentence report indicates that defendant has a prior conviction for felonious assault. After this statement was made, the prosecutor asked to approach the bench. The trial court subsequently instructed the jury, in pertinent part:

> Apparently an inadvertent misstatement that relative to convictions for other than crimes involving dishonesty. [Sic]
>
> Any other such conviction could not be used to impeached [sic]. Only a witness' credibility, only crimes involving dishonesty can used [sic] to impeach a witness' credibility, so that would be the only type of crime you would hear about in this case.

Assuming that trial counsel's inaccurate statement was objectively unreasonable, we nevertheless conclude that relief is not warranted because there is no reasonable probability that the statement affected the outcome of defendant's trial. As an initial consideration, the trial court's corrective remarks did not directly apprise the jury that defendant had any convictions other than those brought out during his testimony. Although the jury may have speculated that defendant had additional convictions, the fact that during cross-examination defendant admitted that he had previously been convicted of larceny by conversion over $100, receiving or concealing stolen property, and larceny between $200 and $1,000 substantially lessened the potential for further prejudice from speculation about other past crimes.

More importantly, given the strong evidence of defendant's guilt, there is no reasonable probability that the outcome of the trial would have been different absent the suggestion of prior convictions. In addition to the complainant's direct assertion that defendant sexually assaulted her, Nurse Lane's testimony that she observed bruises on the complainant's left arm, neck, and back,[1] is more consistent with the complainant's allegation of rape than with defendant's claim

[1] Defendant's expert, Michael Berke, M.D., indicated that bruising and even major tears could result from consensual sexual activity. Dr. Berke also provided the virtually meaningless testimony that from his review of the medical records it was "possible" that the complainant was involved in consensual sex and he replied negatively when asked if there was anything "that tells

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of consensual sex. Further, William Cooley, who had no apparent motive to lie, testified that he went to the Seven-Eleven store on the night of the incident and found that the office door was shut, which was unusual. Because he was waiting for someone to ring up the soft drink he wanted to buy, he knocked on the counter and asked for help, to which a male voice from the back room replied, "Come back later." Then, a man, obviously defendant, and a woman whom Cooley recognized as a store employee exited the back room. Cooley said the woman was hysterical and said that she had been robbed and raped. Cooley testified that the man said, "She's trippin'. That's my wife." If defendant's version of events were true, i.e., that the complainant and he agreed to a scheme in which she would steal money from the store and give it to defendant in return for some Valium, there is no plausible explanation for why she told a customer about the robbery rather than reporting it at a time when no one else would have seen defendant. Moreover, there was no apparent reason for her to have falsely claimed to have been raped. Also, defendant's false claim that the complainant was his wife suggests consciousness of guilt.

Moreover, Darlene Barrow, the owner of the Seven-Eleven store, testified that she offered and gave the complainant some Valium to calm her down after the incident. This corroborated the complainant's testimony about the Valium. Nurse Lane indicated that she noted in her report that the complainant told her that she had taken some Valium. The implausible nature of defendant's version of events strongly suggests that defendant simply seized on the fact that the complainant reported having taken Valium after the incident to concoct the scenario he offered for his defense. Additionally, a police officer testified that DNA testing positively identified defendant as having provided DNA recovered from the complainant. In light of that physical evidence, there was no plausible way for defendant to deny having engaged in sexual contact with the complainant. So, if he were to testify and deny the allegation of sexual assault, as a practical matter, he would have to claim a version of events involving consensual sexual activity. Barrow had no apparent motive to lie about giving the complainant Valium, and it would be a highly unlikely coincidence if the complainant had illicitly obtained Valium from defendant on the same date that Barrow also gave it to her. For all of these reasons, we conclude that there is no reasonable probability that trial counsel's inaccurate statement regarding defendant's prior convictions, which led to an arguably detrimental instruction by the trial court, affected the outcome of the trial.

Defendant also argues that trial counsel was ineffective by failing to object to the prosecutor's argument discussed in part II of this opinion. But, because that argument was proper, trial counsel did not perform below an objective standard of reasonableness by failing to object. *People v Hawkins*, 245 Mich App, 439, 457; 628 NW2d 105 (2001) (trial counsel need not register meritless objections).

Defendant's last claim of ineffective assistance of counsel is based on trial counsel's failure to object to the testimony from Nurse Lane. As discussed previously, even treating this as

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you it was not consensual sex." Apart from this conclusory statement, Dr. Berke's testimony could at best provide some basis for an argument that the trauma to the complainant's genital area resulted from consensual sex. It does not provide a plausible explanation for the bruises to her left arm, neck, and back.

lay opinion testimony in light of the fact that the prosecutor did not ask the trial court to qualify Nurse Lane as an expert witness, the testimony was properly admitted. Thus, trial counsel did not fall below an objective standard of reasonableness in failing to object to this testimony.

In sum, defendant has not established that he was denied the effective assistance of counsel.

IV

Defendant argues that there was insufficient evidence to support his conviction because there were reasons to doubt the credibility of the complainant's testimony.[2] We reject this argument as a matter of law because in assessing the sufficiency of the evidence, we may not weigh it, but rather must make credibility choices in support of the jury's verdict. *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

V

Defendant argues that the habitual offender finding in this case should be vacated because he was not afforded actual notice of the habitual offender charge until after his conviction of the substantive CSC III charge. The record does not support defendant's claim. On the first day of trial, the prosecutor indicated that defendant was on notice of an "habitual offender fourth degree [sic]" charge. The trial court then asked if there was "notice of fourth degree," to which defense counsel replied affirmatively. So, it is clear that defendant received actual notice of the habitual offender charge before he was convicted. To be timely, an habitual offender notice must be filed within twenty-one days after the defendant's arraignment or, if arraignment is waived, within twenty-one days after the filing of the information. MCL 769.13; *People v Ellis*, 224 Mich App 752, 754-755; 569 NW2d 917 (1997). In this case, defendant waived arraignment. Because the information and habitual offender notice were filed on the same date, the habitual offender notice was filed within twenty-one days of the filing of the information in compliance with MCL 769.13. This issue is without merit.

VI

Finally, defendant argues that his minimum sentence of 320 months, the highest possible within the statutory sentencing guidelines range as scored in this case, is disproportionately severe. In this regard, while defendant acknowledges that MCL 769.34(10) purports to preclude appellate relief on such a basis, he contends that this statutory provision is unconstitutional on various grounds. We need not reach this constitutional claim because we conclude that defendant's sentence is not disproportionately severe. Our Supreme Court has stated that "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

[2] Defendant acknowledges that the complainant's testimony (if accepted as true) supports a finding of the charged crime of CSC III.

Defendant had a prior criminal record consisting of four felony and three misdemeanor convictions. Also, the circumstances surrounding the instant offense, a violent sexual assault of a store employee, reflect a disregard not only for society's most basic criminal laws, but also contempt for fundamental human decency. The trial court aptly observed at sentencing that defendant was convicted of "one of the most serious crimes you can be charged with in this society" and that his actions "forever changed the life of another citizen as was spoken by the victim." Considering the serious and egregious nature of defendant's conduct in this case and his prior criminal record, defendant's sentence does not offend the concept of proportionality.

We affirm.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey